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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1321

WILLIAM E. CRAWFORD, and FRANCES B. CRAWFORD, his wife,
Petitioners,

vs.

SECURITY NATIONAL BANK, a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California
First Appellate District
Division Two

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QUESTION PRESENTED

We believe that a more accurate statement of the question raised by Petitioners is:

A State Appellate Court declares state legislation dealing with replevin (claim and delivery) to be unconstitutional because of lack of notice and civil search and seizure requirements. Is there any Constitutional requirement that the decision be retroactive?

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JURISDICTION

We agree with Petitioners that under 28 U.S.C.A. Section 1257(3) a petition for a writ of certiorari lies when the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution of the United States.

The Opinion of the Court of Appeal, First Appellate District, filed November 17, 1975, (Petitioner's Appendix "E") represents the final Judgment of the highest Court of California in which a decision could be had. As indicated in Petitioner's Appendix "F", the California Supreme Court has exercised its discretion and denied a hearing.

THE FORMER CALIFORNIA LAW

Since 1872, California Legislation has provided an auxiliary remedy in an action seeking recovery of personal property. The auxiliary or provisional remedy of claim and delivery accomplishes the same result as the common law form of action of replevin.

> *Faulkner v. First National Bank* (1900) 62 Pac. 463, 130 Cal. 258, 263-4.

The former claim and delivery law is described by the California Supreme Court in *Blair v. Pitchess* (1971) 5 Cal.3d 258, 264-5; 96 Cal.Rptr. 42, 486 Pac. 2d 1242, as follows (Section references are to the California Code of Civil Procedure):

> Originally enacted in 1872, the claim and delivery law establishes a procedure by which the "plain-

tiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer" require the sheriff, constable or marshal of a county to take the property from the defendant. (§§ 509, 511.) To initiate the procedure, the plaintiff must file his complaint, obtain the issuance of a summons, and file an affidavit stating that he owns or is entitled to possession of the property, that the defendant is wrongfully detaining the property and that the property has not been taken for a tax, assessment or fine, or been seized under an attachment or execution. The affidavit must also set forth the alleged cause of the wrongful detention of the property and the actual value of the property. (§ 510.) In addition, the plaintiff must file an undertaking of two or more sufficient sureties for double the value of the property. (§ 512.)

The defendant may except to the plaintiff's sureties (§ 513) or require return of the property by filing an undertaking similar to that required of the plaintiff. (§§ 514, 515.) After the sheriff seizes the property, he must deliver it to the plaintiff upon payment of his fees and necessary expenses (§§ 518, 521), and he must file the undertaking, affidavit and other relevant documents with the clerk of the court in which the action is pending. (§ 520.)

If the plaintiff has secured possession of the personal property through seizure by the Sheriff, the defendant, by his (verified) answer may claim a return thereof. California Code of Civil Procedure Section 627. It is to be noted that Petitioners here, as Defendants below, at no time filed an answer spe-

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cifically claiming a return to them of the personal property taken into possession by the Sheriff through the claim and delivery procedure.

THE COURT OF APPEAL CORRECTLY DECIDED THAT THE DECLARATION OF UNCONSTITUTIONALITY WAS NOT TO BE APPLIED RETROACTIVELY

Blair v. Pitchess, supra (1971) 5 Cal.3d 258, 264-5, 96 Cal.Rptr. 42, 486 Pac.2d 1242, was a taxpayers action against county officers to obtain an injunction restraining the illegal expenditure of public funds in executing the claim and delivery legislation. Following *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337 and a number of Fourth Amendment cases, the California Supreme Court held that the existing claim and delivery legislation violated the Fourth Amendment, the Fifth Amendment, the Fourteenth Amendment and California Constitution Article I, Section 13.

The Constitutional questions now asserted by Petitioners were not raised in the Trial Court.

RESPONDENT'S STATEMENT CONCERNING MATERIAL FACTS

The June 10, 1974, Judgment of the Trial Court from which Petitioner's Appeal to the Court of Appeal was taken sets forth the history of this case as follows:

> This matter appeared on the calendar of the Presiding Judge, June 5, 1974 having been set as the time for trial of the above-entitled action.

CHARLES L. HEMMINGS of COX, CUMMINS & LAMPHERE, A Professional Corporation, appeared for plaintiff, SECURITY NATIONAL BANK. Defendant WILLIAM E. CRAWFORD, in propria persona, appeared for himself and defendant FRANCES B. CRAWFORD was also present in the Courtroom.

Mr. Hemmings asked leave of Court to dismiss the remaining issues concerning money damages prayed for in plaintiff's Complaint and to file a Request for Dismissal. The Court granted the request and ordered plaintiff's Complaint dismissed.

It appears to the Court that plaintiff made a motion for judgment on the pleadings and the motion was granted by a judgment dated January 15, 1970 and signed and filed January 26, 1970. An appeal from the judgment was filed by the defendants. The Court of Appeal on May 24, 1971 in 1/Civil 28406 reversed the judgment on the pleadings and allowed defendants leave to amend their pleadings.

It further appears that in August, 1971, defendants filed an amended answer which included two separate counter-claims, along with a cross-complaint for abuse of process and a cross-complaint for unfair competitive business tactics.

It further appears that the plaintiff SECURITY NATIONAL BANK filed a demurrer to these cross-complaints and counter-claims. On November 9, 1971 a judgment of dismissal was signed and filed with respect to the counter-claims and cross-complaints above-referred to.

An appeal was taken from the judgment of dismissal and on December 13, 1972 the Court

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of Appeal in 1/Civil 31227 dismissed the appeal on the grounds that the complaint was still pending and therefore the judgment of dismissal dated November 9, 1971 was not a final judgment from which an appeal would lie.

The defendants made a motion to advance the case for trial, which was granted, and the trial date June 5, 1974 was set by the County Clerk.

In this posture of the action, the counter-claims and cross-complaints could not be tried. As a recital of the foregoing proceedings in this action, and good cause appearing,

It Is Ordered, Adjudged and Decreed:

1. The request of plaintiff SECURITY NATIONAL BANK that its complaint be dismissed as to the remaining issue of money damages is granted and plaintiff's complaint is ordered dismissed as to all remaining issues.

2. The judgment of dismissal filed November 9, 1971 as to the defendants' two counter-claims and two cross-complaints is and is adjudged to be the judgment of the Court.

(Clerk's Transcript, pp. 25-27).

Petitioners were present in the Trial Court. They did not object to the requested dismissal of the remaining causes of action. A copy of the proposed Judgment was mailed to Petitioners on June 5, 1974, and again Petitioners did not object.

The same Second Division of the First District Court of Appeal which decided the present case, decided *EAC Credit Corp. v. Bass* (1971) 21 Cal.App. 3d 645, 98 Cal.Rptr. 681 and said:

Upon argument before us, Harry R. Johnson, the third party claimant, first suggested that the holding of *Blair v. Pitchess,* 5 Cal.3d 258 [96 Cal.Rptr. 42, 486 P.2d 1242], on July 1, 1971 retroactively condemned the California claim and delivery procedure. However, in the court below such contention was not raised. The question of title was fully and fairly litigated there and before this court. Pursuant to the judgment below, both parties took possession of such items then held to be theirs.

Blair v. Pitchess, supra, was not retroactive and is to be applied prospectively.

It enjoined the prospective application of the claim and delivery procedures (Code Civ. Proc., §§ 509-521) in effect since 1872. (*Forster Shipbldg. Co. v. County of L. A.* (1960) 54 Cal.2d 450, 459 [6 Cal.Rptr. 24, 353 P.2d 736]; *Larez v. Shannon* (1970) 2 Cal.3d 813, 816 [87 Cal.Rptr. 871, 471 P.2d 519].)

A holding of retroactivity of the statute would have upset every claim and delivery for many years prior to the *Blair v. Pitchess* decision in 1971.

The California legislature took heed of the decision in *Blair v. Pitchess, supra.*

By Stats 1972, Chap. 855, § 1, Code of Civil Procedure §§ 509-521 were repealed. Newer legislation covering claim and delivery was adopted by Stats 1972, Chap. 855, § 2.

This newer legislation was repealed by Stats 1973, Chap. 526, § 1. The present claim and delivery legis-

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lation was added by Stats 1973, Chap. 526, § 2, prospectively operative July 1, 1974.

The Petition for Writ of Certiorari should be denied.

Dated, Martinez, California,
April 6, 1976.

Respectfully submitted,

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A PROFESSIONAL CORPORATION,
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